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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. KANURI SURGURY QAWI, Defendant and Appellant.	A106133 (Alameda County Super. Ct. No. 94-38478)

Following a jury trial, defendant's commitment as a mentally disordered offender was extended an additional year upon a finding that he continued to pose a substantial danger of physical harm to others due to a severe mental disorder which cannot be kept in remission without continued confinement and treatment. In this appeal he complains of improper discharge of potential jurors for cause, erroneous admission of his testimony, and instructional error on the consequences of the verdict. We find that the jurors were properly excused, the court did not err by admitting defendant's testimony on his mental condition, and no instructional error occurred. We therefore affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In August of 1991, defendant was found guilty of felony assault (Pen. Code, § 245, subd. (a)(1)),[1] misdemeanor assault (§ 240), and two counts of misdemeanor

[1] All further statutory references are to the Penal Code unless otherwise indicated.

battery (§ 242), and sentenced to state prison for a term of four years. He was granted parole in July of 1993, but following an arrest for felony stalking in May of 1994, was incarcerated in the California Medical Facility at Vacaville. Beginning in July of 1995, he was evaluated for referral and commitment as a mentally disordered offender (hereafter MDO) pursuant to section 2962.[2] He was found to meet all the criteria required for placement and treatment, based upon a diagnosis of paranoid schizophrenia or paranoid personality disorder. Defendant's MDO commitment has been extended annually since 1995 pursuant to section 2970. The petition to extend defendant's MDO commitment which is the subject of the present appeal was filed by respondent on September 11, 2003.

At the recommitment hearing the prosecution elicited testimony from John Parkinson, the Oakland Police Officer who arrested defendant for assault on October 9, 1990. At 11:14 that night he was dispatched to Ninth and Franklin Streets in Oakland. Once he arrived there officer Parkinson observed the two victims, Mary Miller and Robert Lakeman, lying on the ground, with defendant standing near the "male's head with no shirt on." The officer also noticed "a lot of blood on the male victim," and blood on the face and hands of the female victim. Defendant ran from the scene but was quickly apprehended by officer Parkinson. Defendant had blood on his pants and shoes.

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[2] Under the Mentally Disordered Offenders Act (§§ 2960-2981; hereafter MDO Act), "a prison inmate who (1) has a severe mental disorder, not in remission or unable to be kept in remission without treatment, which was a cause of or factor in his criminal behavior, and (2) as a result of the mental disorder poses a substantial danger of physical harm to others, may be committed as an inpatient to a state mental hospital or ordered as a condition of parole to submit to mental health treatment as an outpatient. (§§ 2962, subds. (a), (b) & (d)(1), 2964, subd. (a).) [¶] Upon discharge of the prisoner's parole, a superior court may order the prisoner held 'for continued involuntary treatment for one year' upon a district attorney's petition, supported by affidavits specifying the prisoner was continuously provided mental health treatment, and alleging 'that the prisoner has a severe mental disorder, that the severe mental disorder is not in remission or cannot be kept in remission if the person's treatment is not continued, and that, by reason of his or her severe mental disorder, the prisoner represents a substantial danger of physical harm to others.' (§ 2970.) At trial on the petition, before judge or jury, the People have the burden of proof beyond a reasonable doubt. (§ 2972, subds. (a)-(c).) The district attorney may petition for the person to be recommitted from year to year. (§ 2972, subd. (e).)" (*Zachary v. Superior Court* (1997) 57 Cal.App.4th 1026, 1031; fns omitted; see also *People v. Williams* (1999) 77 Cal.App.4th 436, 444-445.)

Officer Parkinson subsequently interviewed the victims. Miller told officer Parkinson that she was kicked in the face by defendant, who mentioned "something about her being blond and Vietnam as he kicked her." Lakeman disclosed that as Miller was leaning over a wall defendant suddenly appeared and "kicked her in the face." When Lakeman came to her assistance he was kicked and punched repeatedly by defendant.

Testimony on the May 1994 felony stalking incident was adduced from Sergeant Paul Rolleri of the Alameda Police Department. He reported to an address on Asbay Street in response to a call from defendant, and observed him leaning against a post looking in the direction of a house. Sergeant Rolleri contacted defendant and engaged him in conversation. Defendant was tense and his hands were shaking, but he spoke calmly to the officer. He told Sergeant Rolleri that his wife lived in the residence at 105 Asbay, and he "was interested in getting some things from his house." Sergeant Rolleri "had reason to believe" that neither defendant nor his wife lived in the house, and the name defendant gave did not match the resident listed at that address. During subsequent questioning defendant was uncooperative or nonresponsive. Based upon defendant's anxious demeanor and evasiveness Sergeant Rolleri determined that he "was a danger" to the occupant of the house, and detained him for investigation. The detention was subsequently "converted into a psychiatric hold" pursuant to Welfare and Institutions Code section 5150, and defendant was transported to a psychiatric hospital.

Upon his commitment to the John George Psychiatric facility defendant indicated that his wife had "locked him out of the house in a domestic quarrel," although the woman who occupied the residence indicated she "never met" him. He was "very delusional," angry and agitated, which necessitated the use of restraints on him. He threatened to kill many of the "staff people at the hospital there," and five days after he was admitted he assaulted one of the doctors who extended his commitment. Ultimately, defendant was considered "too dangerous" for the facility, and was transferred to San Quentin Prison. At San Quentin, defendant engaged in physical altercations with cellmates, so he was transferred to the California Medical Facility, where he was described as "very delusional."

Expert testimony was presented by Dr. Neelam Sachdev, the staff psychiatrist who treated defendant at Napa State Hospital since March of 2002. Dr. Sachdev offered the diagnosis that defendant suffers from the mental disorder of schizophrenia, paranoid type. Defendant's mental illness "cannot be cured," but may be placed into "some sort of remission" with proper treatment and continued medication so he "can function in society." When defendant is unmedicated and untreated he suffers from "delusions and paranoid ideations."

According to Dr. Sachdev, defendant "has had many episodes of becoming very psychotic and very paranoid and delusional," meaning that he "has lost touch with reality." The assault offenses in 1990 were committed when defendant was "quite delusional" in his thinking that a blond woman whom he "never met before, had caused the Vietnam war." Another illustration of psychotic, delusional thinking is found in defendant's conviction that "a woman was his wife" and had "thrown him out" of a house he owned, although the owner of the house confirmed that she was not acquainted with defendant. Defendant expressed a paranoid delusional belief that his ex-wife and fellow inmates injected him with cocaine in 1995.[3] In the past, he also suffered from "auditory hallucinations" while confined: he heard voices that told him he would be forced to take cocaine.[4] In 2001 defendant reported that he had been stabbed in the head by someone at Napa State Hospital, although the record failed to indicate "any kind of injury" to him.

Defendant wrote a letter to a social worker in December of 2002 in which he represented that he "was a virology scientist" who had gone to medical school in Nashville, Tennessee, and had worked with the "FBI or the CIA," all of which "did not correlate with his record." Defendant thereafter wrote "multiple letters" to the FBI, and insisted the FBI "was going to get him out of the hospital." In one letter defendant wrote that his defense attorney, an assistant Alameda County public defender, was a military

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[3] A drug screen taken of defendant at the time was negative.

[4] Currently, Dr. Sachdev testified, defendant is primarily "delusional," and does not suffer from hallucinations.

intelligence agent and a member of the mafia who "framed" him for the assaults that occurred in October of 1990. He also fallaciously stated in a letter that he owns houses in Alameda, Berkeley and Monterey, and provides scholarships for poor children.

Dr. Sachdev testified that during his commitment defendant has regularly refused to "discuss anything" related to his psychiatric condition. He has also failed to attend group therapy sessions or participate in treatment at Napa State Hospital. During the duration of his MDO commitment defendant often expressed opposition to administration of prescribed antipsychotic medication, and intermittently failed to take the medicine given to him, with the result that his behavior decompensated to become more paranoid and delusional.[5] According to Dr. Sachdev, if defendant stopped taking antipsychotic medication upon release he would begin to exhibit symptoms within a few weeks and "would be truly very psychotic" within three to four months. Defendant has consistently denied to Dr. Sachdev that he is mentally ill, has denied culpability for his initial offense or parole violations, and has remained uninterested and uncooperative in psychotherapy or other forms of psychosocial treatment. He has no psychosocial support therapy group in the community or relapse prevention plan to monitor or assist him if he is released.

During his commitment at Napa State Hospital defendant has threatened to harm staff or other patients, but has not recently committed any acts of violence. Dr. Sachdev testified that the lack of any recent assaultive behavior by defendant has been due to two factors: the medications administered to him that ameliorate his "psychotic symptoms;" and, the "space" within the facility given to him by the staff to "be by himself" and avoid

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[5] In prior litigation that ultimately proceeded to the California Supreme Court defendant established the right of an MDO under Penal Code section 2972, subdivision (g), to refuse antipsychotic medication for mental disorders, in the absence of a judicial determination of incompetence or a finding that the MDO is dangerous within the meaning of Welfare and Institutions Code section 5300. (See *In re Qawi* (2004) 32 Cal.4th 1, 9-10.) Defendant testified in the present proceeding that he did not know why he filed the lawsuit, and only knew that it was about "[d]rugs." When the trial in the present case was conducted, the Supreme Court opinion had not yet been issued and Napa State Hospital then continued to involuntarily administer antipsychotic medication to patients, including defendant.

contact with others.[6] Given defendant's "history of violence" and psychotic behavior, Dr. Sachdev indicated that "he would become assaultive" without medication and staff support within the hospital. Dr. Sachdev also offered the opinion that without continued commitment, treatment and medication defendant presents a "high risk" or at least a substantial danger of physical harm to others.

Defendant was called as a witness for the prosecution. He testified that after graduation from high school in 1978 he attended Tennessee College of Medicine for seven years and obtained the degree of "MD in virology."[7] He thereafter undertook "independent research" and experimentation on "HIV, AIDS" and diabetes. According to defendant, his research uncovered "that diabetes is a condition of the color red," such as "color red No. 40" dye used in food preservation.

Defendant gave his version of the incident that occurred on October 9, 1990, and resulted in his assault conviction. He was just "coming up the street" when he "ran into two people," a White man and woman. The man gave defendant "the finger and used the 'N' word." Defendant said, "Man, you don't know me, don't talk to me like that." After they pushed each other, the man "took a swing" at defendant, whereupon defendant "hit him in the stomach." After the man fell to the ground defendant kicked him three times. The woman then ran away from the scene briefly, but returned. Defendant proceeded to call 911 to advise the operator that "a White man was laying down there" and "had blood coming from his nose." The police then arrived and arrested him. Defendant denied that he hit or kicked the woman, although he acknowledged he grabbed her hair when she jumped on his back. He also insisted that he never made a comment "about blondes and Vietnam." Defendant testified that he "was wrong for fighting," and "apologized."

Defendant denied that he experienced delusions or auditory hallucinations when he was hospitalized in 1995. He also denied that he assaulted another inmate during his

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[6] For instance, defendant was given meals in his room rather than required to eat in the dining room to prevent him from assaulting anyone.

[7] Defendant also testified it was "possible" he went to Cornell University.

commitment in 1995. He testified that he does not have a wife. He did not recall telling anyone in 1995 that his wife forced him to take drugs. Defendant explained that he refused to talk to mental health professionals during 1995 because he was involuntarily "locked up," and felt he did not need treatment. In response to a query about whether he owns any houses, defendant replied, "I don't think so."

Defendant recounted that he was sent to Atascadero in 1996, then to Patton between 1998 and 2000, and had been at Napa State Hospital for the past 40 months. He spends his time at Napa primarily in the "TV room," where he reads, does "legal work," and watches television. He eats his meals in the "unit," rather than the dining room with other patients, to avoid fights and other disturbances. Defendant testified that his "life" has been threatened by "quite a few" people at Napa State Hospital, and he has given their names to the staff.

At trial, defendant admitted that he does not normally attend the voluntary relapse prevention group therapy sessions, but claimed he has a relapse prevention plan, which "consists of not getting in any fights" and taking medication if he "start[s] having problems." He testified that he had not taken any medication for the past two days because he does not "really need it." Defendant expressed the opinion that the medications he has been given are not helpful to him, and have numerous unpleasant side-effects, although he usually voluntarily takes them. He does not know where he would live if he left Napa State Hospital.

Following the trial, the jury found that defendant poses a substantial danger of physical harm to others due to a severe mental disorder, which cannot be kept in remission without continued confinement and treatment. The court ordered defendant's involuntary MDO commitment extended until February 17, 2005. This appeal followed.

DISCUSSION

I. The Dismissal of Jurors for Cause.

Defendant complains that the trial court erred by excusing prospective Jurors 54 and 64 for cause. He maintains that the excused jurors "showed no bias or prejudice,"

but rather only permissible opinions and "skepticism" on the weight to be given expert psychiatric opinion testimony.

"[A] prospective juror may be excused if the juror's voir dire responses convey a 'definite impression' [citation] that the juror's views 'would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." ' [Citation.]" (*People v. Holt* (1997) 15 Cal.4th 619, 650-651; see also *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Jones* (2003) 29 Cal.4th 1229, 1246; *People v. Guzman* (1988) 45 Cal.3d 915, 954-955.) " 'Either party may challenge an individual juror for "an actual bias." [Citation.] "Actual bias" in this context is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." [Citations.] A sitting juror's actual bias that would have supported a challenge for cause also renders the juror unable to perform his or her duties and thus subject to discharge. . . .' [Citation.]" (*People v. Ayala* (2000) 24 Cal.4th 243, 271-272; see also *People v. Nesler* (1997) 16 Cal.4th 561, 581.) " 'To find actual bias on the part of an individual juror, the court must find "the existence of a state of mind" with reference to the case or the parties that would prevent the prospective juror "from acting with entire impartiality and without prejudice to the substantial rights of either party." ' [Citations.]" (*People v. Horning* (2004) 34 Cal.4th 871, 896.)

The excusal of a prospective juror for cause "is reviewed for abuse of discretion." (*People v. Merced* (2001) 94 Cal.App.4th 1024, 1029-1030.) "The determination of a juror's qualifications fall ' "within the wide discretion of the trial court, seldom disturbed on appeal." ' [Citation.] There is no requirement that a prospective juror's bias . . . be proven with unmistakable clarity. [Citation.] Instead, 'it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' [Citation.]" (*People v. Haley* (2004) 34 Cal.4th 283, 306; see also *People v. Jones*, *supra*, 29 Cal.4th 1229, 1246-1247.)

" ' " 'On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.' [Citations.]" ' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 975; see also *People v. Stewart* (2004) 33 Cal.4th 425, 441; *People v. Heard* (2003) 31 Cal.4th 946, 958.) " 'On review of a trial court's ruling, if the prospective juror's statements are equivocal or conflicting, that court's determination of the person's state of mind is binding. If there is no inconsistency, the reviewing court will uphold the court's ruling if substantial evidence supports it.' [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 376-377; see also *People v. Horning*, *supra*, 34 Cal.4th 871, 896-897; *People v. Lucas* (1995) 12 Cal.4th 415, 481.) We must give "deference to the trial court which had the opportunity to observe and listen to the juror." (*People v. Holt, supra,* 15 Cal.4th 619, 651; see also *People v. Cain* (1995) 10 Cal.4th 1, 60; *People v. Wader* (1993) 5 Cal.4th 610, 652.) " ' "If there is any substantial evidence supporting the trial court's ruling, we will uphold it. . . ." ' " (*People v. Diaz* (2002) 95 Cal.App.4th 695, 699-700, quoting from *People v. Cleveland* (2001) 25 Cal.4th 466, 474.) The trial court's discretion, however, "is 'bridled to the extent' the juror's inability to perform his or her functions must appear in the record as a 'demonstrable reality,' and 'court[s] must not presume the worst' of a juror." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729; see also *People v. Szymanski* (2003) 109 Cal.App.4th 1126, 1131.)

Looking at the record before us, Juror 54 disclosed that he had worked in medical facilities in the past, which included 14 mental health professionals in a group of about "20 doctors." He found that psychiatrists and psychologists "were very standardized in their treatment with their patients." Juror 54 espoused the view based upon his personal experience that psychologists and psychiatrists were not "helpful to the patients they were treating." They undertook "standardized" questioning of patients and diagnosed "every one the same," without differentiating between patients. He articulated the view that the expert opinions offered by mental health professionals would be unpersuasive and did not "carry much weight" with him. In response to the judge's question, Juror 54 stated that

his response to the opinion testimony of an "expert psychiatrist" who had reviewed medical and police reports would be to "say you can't possibly know who you claim to know." He perceived "no value" in expert testimony in the field of the mental health profession.[8]

Juror 64 stated in his questionnaire that psychiatrists and psychologists "are not real professionals" and "care less about" the patients they treat. He added that he may "have difficulty believing them." When examined by the court Juror 64 explained that his strong views were based upon his experience with the improper and ineffectual treatment his brother received for depression from several psychiatrists. He also stated that the psychiatrists did not attempt to treat "the root cause of the issues," but rather merely prescribed medications for his brother. Juror 64 acknowledged to the trial court that he does not "trust" mental health professionals and would "give their testimony less weight automatically."

We find no abuse of discretion in the trial court's decision to excuse Jurors 54 and 64 for cause. Both jurors expressed extremely negative bias in their perceptions of the value of expert psychiatric opinion testimony. The court was also justified in finding that the resolute, entrenched views conveyed by the excused jurors would prevent or substantially impair their impartiality in the assessment of the critical expert opinion testimony in the case. The bias of the prospective jurors went beyond mere opinions, preconceptions or "skepticism" based upon "life experiences," as defendant suggests. The jurors did not express equivocal or alterable positions upon the credibility of the experts; they stated definitive views that affected their ability to fairly judge the case. Jurors 54 and 64 were not, according to their responses, capable of fulfilling their duty to impartially evaluate the testimony of the expert witnesses solely from evidence adduced at the trial. (See *People v. Nesler, supra*, 16 Cal.4th 561, 588; *People ex rel. Dept. Pub.*

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[8] Juror 54 also revealed that he was mugged and robbed many years before, and the "emotions from that incident" still affected him, but he nevertheless "could be fair and impartial" at least as related to that event.

Wks. v. Curtis (1967) 255 Cal.App.2d 378, 381.) Substantial evidence supports the dismissal of those jurors. (*Larios v. Superior Court* (1979) 24 Cal.3d 324, 330-331.)

Defendant further complains that the trial court was deficient in its effort to question Jurors 54 and 64 to "rehabilitate" them, "as it did with other prospective jurors." Defendant contrasts the claimed inadequate examination of the dismissed jurors with the "extensive" colloquies the court undertook with Jurors 23 and 34, "who had expressed similar" negative views about mental health professionals, but were accepted by the trial court after questioning.

We have no quarrel with defendant's essential position that when "a trial court is put on notice that good cause to discharge a juror may exist, 'it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and failure to make this inquiry must be regarded as error.' [Citations.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 141.) Before dismissing a juror for cause "a trial court must have sufficient information regarding the prospective juror's state of mind to permit a reliable determination as to whether the juror's views would ' "prevent or substantially impair" ' the performance of his or her duties (as defined by the court's instructions and the juror's oath) [citation] ' " ' 'in the case before the juror' " ' " (citation)." (*People v. Stewart, supra*, 33 Cal.4th 425, 445.) As we read the record before us, however, the trial court did not ignore its duty to undertake an adequate investigation before discharging the jurors. The court was not required to restore the neutrality of the jurors, or even attempt to do so, but only to undertake the reasonably necessary inquiry to determine if grounds existed to excuse or discharge Jurors 54 and 64. (*People v. Burgener* (2003) 29 Cal.4th 833, 879; *People v. Farnam, supra,* at p. 141; *People v. Pinholster* (1992) 1 Cal.4th 865, 927-928; *People v. Diaz, supra,* 95 Cal.App.4th 695, 703.) The court adequately examined the excused jurors to the extent necessary to find that their rejection of the testimony of mental health experts was neither diffident nor alterable, and would impair their ability to fairly judge the case. (*People v. Hill* (1992) 3 Cal.4th 959, 1003-1004; *People v. Merced, supra,* 94 Cal.App.4th 1024, 1029-1031.) The dismissal of the jurors for cause was not an abuse of discretion.

II. The Admission of Defendant's Testimony.

We next confront defendant's argument that he was improperly compelled to "testify against himself as a prosecution witness" over the objection of his counsel. He claims that in accordance with the opinion in *People v. Haynie* (2004) 116 Cal.App.4th 1224, 1230 (*Haynie*), the privilege against self-incrimination extends to MDO proceedings, and therefore the trial court erred by admitting his testimony.

"In a criminal proceeding, an accused has an absolute right not to be called as a witness and not to testify." (*People v. Pretzer* (1992) 9 Cal.App.4th 1078, 1083-1084.) However, we examine defendant's claim that he is entitled to assert the privilege against compelled testimony in this action in light of the established principle that " 'MDO commitment proceedings are civil in nature and therefore defendants presented with possible commitment do not enjoy the constitutional rights accorded criminal defendants.' [Citation.]" (*People v. Smith* (2005) 127 Cal.App.4th 896, 908-909; see also *People v. Renfro* (2004) 125 Cal.App.4th 223, 231; *People v. Williams* (2003) 110 Cal.App.4th 1577, 1588-1589; *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, 1273; *People v. Robinson* (1998) 63 Cal.App.4th 348, 350.) "Constitutional components of criminal trials are not afforded in MDO proceedings." (*People v. Smith, supra,* at p. 909.) A defendant in a civil MDO proceeding may be entitled to the rights enumerated by statute – such as the rights to counsel, a jury trial, a unanimous verdict, proof beyond a reasonable doubt, and criminal discovery (§ 2972) – but does not have the same constitutional protections as are afforded in criminal trials. (*People v. Johnwell* (2004) 121 Cal.App.4th 1267, 1275-1276; *People v. Williams, supra,* at pp. 1588-1590; *People v. Cosgrove, supra,* at p. 1273.)

The absolute privilege against compulsory self-incrimination is not articulated in the MDO statutory scheme. Thus, the courts have uniformly concluded that, "A party named in a section 2970 petition has no absolute right not to be called as a witness by the state under the Fifth Amendment to the United States Constitution, although the privilege against self-incrimination applies to the extent it exists in other civil actions." (*People v.*

Smith, supra, 127 Cal.App.4th 896, 909; see also *People v. Beeson* (2002) 99 Cal.App.4th 1393, 1406-1407.)

In *People v. Merfeld* (1997) 57 Cal.App.4th 1440, another division of this court resolved the issue of a defendant in an MDO proceeding who objected that the prosecutor called him as a witness in violation of his constitutional right against self-incrimination. Relying on the United States Supreme Court opinion in *Allen v. Illinois* (1986) 478 U.S. 364,[9] and the California Supreme Court decision in *Cramer v. Tyars* (1979) 23 Cal.3d 131 (*Cramer*),[10] the conclusion was reached in *Merfeld* that "the extended commitment hearing under section 2972 is not punitive, and" therefore the defendant "is not entitled to a criminal defendant's absolute right to refuse to testify." (*People v. Merfeld*, *supra*, at p. 1446.) The court reasoned that the MDO defendant as a witness "still retains the right to

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9 In *Allen v. Illinois*, *supra*, 478 U.S. 364, 373-374, the United States Supreme Court held that proceedings under the Illinois Sexually Dangerous Persons Act are not "criminal" within the meaning of the Fifth Amendment's guarantee against compulsory self-incrimination. The court rationalized that since the aim of the law was to provide treatment, not punishment, for persons adjudged sexually dangerous, the act was not an ex post facto law. In reaching this conclusion, the court was swayed by the act's requirement that the state prove more than the commission of a criminal act. Under the act, the state was obligated to prove the existence of a mental disorder lasting for more than one year and a propensity to commit criminal acts with evidence of more than just the prior commission of sexual offenses. In addition, the availability of some of the safeguards applicable in criminal proceedings—rights to counsel, to a jury trial, and to confront and cross-examine witnesses, and the requirement that sexual dangerousness be proved beyond a reasonable doubt—did not, the court concluded, "turn these proceedings into criminal prosecutions requiring the full panoply of rights applicable there." (*Id*., at p. 372.) Further, the commitment of a person adjudged sexually dangerous under the act to a maximum-security institution that also houses convicts needing psychiatric care did not transform the conditions of that person's confinement into "punishment" and thus render "criminal" the proceedings that led to confinement. (*Id*., at p. 374.)

10 *Cramer, supra*, 23 Cal.3d 131, presented the issue of the propriety of calling the defendant as a witness in an involuntary commitment proceeding pursuant to Welfare and Institutions Code section 6502. The court stressed that "two separate and distinct testimonial privileges" were under consideration: "In a criminal matter a defendant has an absolute right not to be called as a witness and not to testify. [Citations.] Further, in any proceeding, civil or criminal, a witness has the right to decline to answer questions which may tend to incriminate him in criminal activity. [Citation.] However, as we shall develop more fully, notwithstanding these privileges, no witness has a privilege to refuse to reveal to the trier of fact his physical or mental characteristics where they are relevant to the issues under consideration." (*Cramer, supra,* at p. 137, italics omitted.) The court concluded that the proceeding was a civil matter and declined to extend the privilege against being called as a witness to matters outside the criminal justice system. (*Id.* at pp. 137-138.)

refuse to answer any question in any hearing, civil or criminal, that may tend to incriminate him or her in criminal activity. Despite this privilege, however, 'no witness has a privilege to refuse to reveal to the trier of fact his physical or mental characteristics where they are relevant to the issues under consideration.' [Citation.]" (*Ibid*.; see also *People v. Williams, supra,* 110 Cal.App.4th 1577, 1589-1590.) The court therefore found that, while the defendant " 'could not be questioned about matters that would tend to incriminate him, he was subject to call as a witness and could be required to respond to nonincriminatory questioning which may have revealed his mental condition to the jury, whose duty it was to determine whether he was [severely mentally disordered].' [Citation.]" (*People v. Merfeld*, *supra,* at p. 1446; see also *People v. Williams, supra*, at pp. 1588-1590; *People v. Clark* (2000) 82 Cal.App.4th 1072, 1080-1082.)

Defendant implores us not to follow *Merfeld*, which, he complains, failed to consider the "recent *Haynie* case construing the similar statutory scheme for commitment of defendants found not guilty by reason of insanity," and "did not take into account the controlling Supreme Court precedent, *Conservatorship of Roulet* (1979) 23 Cal.3d 219" (*Roulet*). The *Haynie* decision is entirely distinguishable and unpersuasive, as it was based upon interpretation of the separate statutory scheme for commitment of persons found not guilty of a felony by reason of legal insanity. The stated issue was "whether the statutory language '[t]he person shall be entitled to the rights guaranteed under the federal and State Constitutions for criminal proceedings,' extends an absolute right not to testify to persons during a commitment-extension trial pursuant to section 1026.5."[11] (*Haynie, supra*, 116 Cal.App.4th 1224, 1228.) The court concluded: "Here, the Legislature's words clearly and unambiguously state the person 'is entitled to the rights

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11 Section 1026.5, subdivision (b)(7), provides, in relevant part: "The person shall be entitled to the rights guaranteed under the federal and state Constitutions for criminal proceedings. All proceedings shall be in accordance with applicable constitutional guarantees. The state shall be represented by the district attorney who shall notify the Attorney General in writing that a case has been referred under this section. If the person is indigent, the county public defender or State Public Defender shall be appointed. . . . Appointment of necessary psychologists or psychiatrists shall be made in accordance with this article and Penal Code and Evidence Code provisions applicable to criminal defendants who have entered pleas of not guilty by reason of insanity."

guaranteed under the federal and State Constitutions for criminal proceedings.' A defendant in a criminal matter has an absolute right not to be called as a witness and not to testify. [Citations.] Under the plain language of the statute, because Haynie is entitled to the same rights guaranteed to a criminal defendant, he should not have been compelled to testify in the prosecution's case at his commitment extension trial." (*Ibid*.) The MDO statutory scheme does not contain a similar provision that grants defendants the constitutional rights guaranteed in criminal proceedings.

We also find nothing in the *Roulet* opinion that casts doubt upon the reasoning in *Merfeld* and other opinions that have denied MDO defendants the absolute right not to be called as a witness and required to respond to nonincriminatory questioning which may reflect upon the issue of mental condition. In *Roulet, supra*, 23 Cal.3d 219, 223, the court decided that the standards in "criminal trials" of "proof beyond a reasonable doubt and a unanimous jury verdict are the proper standards to apply before a conservator can be appointed" under the grave disability provisions of the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5350, et seq.). (*Roulet, supra*, at p. 221.) The court observed that the characterization of the commitment as "only a 'civil' confinement for remedial purposes" was a "mere" label, and " 'because involuntary commitment is incarceration against one's will regardless of whether it is called "civil" or "criminal" [citation], the choice of standard of proof implicates due process considerations which must be resolved by focusing not on the theoretical nature of the proceedings but rather on the actual consequences of commitment to the individual.' [Citations.]" (*Id*., at pp. 224, 225.) The court added: "The civil nature of grave disability proceedings is likewise an insufficient excuse for allowing a person to lose his liberty and good name at the hands of less than a unanimous jury." (*Id*., at p. 230.)[12]

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[12] Other cases have held that in "various civil or special proceedings that can result in lengthy involuntary confinement and social stigmatization" the defendant must be afforded "the full panoply of due process rights, including trial by jury, applicable in criminal cases are applicable to certain noncriminal proceedings. (See *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [due process requires unanimous jury verdict in 'gravely disabled' civil commitment conservatorship proceeding under the Lanterman-Petris-Short Act

Roulet does not alter or bring into doubt the Fifth Amendment analysis in *Cramer* and *Merfeld* that the privilege against self-incrimination is not absolute in a civil MDO proceeding. (See *In re Howard N.* (2005) 35 Cal.4th 117, 127-130; *People v. Robinson, supra,* 63 Cal.App.4th 348, 349-350; *People v. Superior Court (Myers)* (1996) 50 Cal.App.4th 826, 834.) The privilege against self-incrimination "does not apply to revelation of the witness's physical or mental characteristics where they are relevant to the issues being considered." (*People v. Pretzer, supra,* 9 Cal.App.4th 1078, 1084.) Thus, the prosecutor was entitled to call defendant "as a witness to answer questions concerning his present mental condition. The status of [defendant's] present mental condition and whether he posed a substantial danger of physical harm to others were issues to be resolved by the trier of fact. (§ 2962, subd. (d).) [¶] [Defendant's] response to the prosecutor's inquiries regarding these issues would not be considered testimonial evidence within the privilege against self-incrimination, whether the proceeding is characterized as civil or criminal." (*People v. Pretzer, supra,* at p. 1084; see also *People v. Williams, supra,* 110 Cal.App.4th 1577, 1588-1590; *People v. Clark, supra,* 82 Cal.App.4th 1072, 1080-1082; *People v. Superior Court (Myers), supra,* at p. 836.) We find no error in the admission of defendant's testimony.

III. The Instruction on the Consequences of the Verdict.

Defendant's final contention is that the trial court erred by giving the jury "information sufficient to make it aware of the consequences of its verdict." Defendant acknowledges that the trial court specifically instructed the jury: "In your deliberations do not discuss penalty, punishment or consequences. . . . That subject must not in any way affect your verdict." He nevertheless argues that the court "on a number of occasions,

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(LPS Act)]; *People v. Thomas* (1977) 19 Cal.3d 630, 644 [139 Cal.Rptr. 594, 566 P.2d 228] [due process requires unanimous jury and proof beyond a reasonable doubt in 'narcotics addict' civil commitment proceedings]; *People v. Feagley* (1975) 14 Cal.3d 338, 376 [121 Cal.Rptr. 509, 535 P.2d 373] [due process requires unanimous jury verdict in 'mentally disordered sex offender' civil commitment proceedings]; *People v. Burnick* (1975) 14 Cal.3d 306, 332 [121 Cal.Rptr. 488, 535 P.2d 352] [due process requires proof beyond a reasonable doubt in 'mentally disordered sex offender' commitment proceedings].)" (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1246.)

allowed the jury to learn of the consequences of its verdict" during the course of the trial: when, during voir dire, the court recited an allegation in the petition that defendant's commitment "will expire on February 17, 2004;" during examination of prospective jurors – particularly Jurors 36, 68, and 86 – when the topic of the release of "dangerous" offenders was discussed; and, during the prosecutor's closing rebuttal argument when he noted that defendant's paranoid schizophrenia was a "tragic event" for him and his family. The effect of these references, complains defendant, is that the jury learned the verdict would determine whether he "would be released or continue to be confined."

Defendant claims that the court thus violated the principles articulated in *People v. Collins* (1992) 10 Cal.App.4th 690, 693-694, where the jury was instructed that the respondent "may be hospitalized" if found to be mentally ill, but was "presumed to be entitled to be released on parole" if the jury found otherwise. "Together, these instructions told the jury that it would determine whether appellant should be hospitalized or released on parole." (*Id.*, at p. 695.) The jury in *Collins* also received two verdict forms: The first stated that the respondent met the criteria for commitment under section 2962 and should be " 'treated by the Department of Mental Health as an inpatient," and the second stated that the respondent did not meet the criteria and "should be released on parole.' " (*Id.*, at p. 694.) The court found controlling "the rule of *People* v. *Kipp* (1986) 187 Cal.App.3d 748, 750-751," which "held it is error to advise the jury in an NGI extension proceeding that their verdict will decide whether the petitioner should be released or continue to be confined for involuntary treatment. Such an instruction is likely to distort the verdict because the jury could fear his release and be more inclined to rule against the NGI committee regardless of the evidence." (*People v. Collins, supra*, at p. 695.) The error was "exacerbated," the court further found, by the verdict forms which "led the jury to believe it was deciding whether appellant should be treated as an inpatient or released." (*Id*., at p. 696.) The court then concluded: "We hold it was error to instruct the jury of the consequences of MDO finding. As stated in *Kipp*: 'There can be no purpose to advising a jury of the consequences of its decision under the present circumstances, except to improperly deflect its attention from the issue of the defendant's

current mental condition to the possible effect of a decision to find [in his favor], i.e., to "stack the deck" against the defendant. . . . The instruction . . . blatantly suggests the jury should weigh the potential effect of a sanity finding on the same scale used to make the determination itself. . . .' [Citation.]" (*People v. Collins*, *supra*, at p. 696; see also *People v. Superior Court (Myers), supra,* 50 Cal.App.4th 826, 836; *People v. Tate* (1994) 29 Cal.App.4th 1678, 1683.)

Here, in contrast to the *Collins* case, the jury was never instructed or otherwise told by the court that defendant would be released into society if he was not recommitted as requested in the petition. Any references to the consequences of the jury's verdict were oblique, vague, and not the result of any instructional error by the trial court or prosecutorial misconduct. The court gave the proper instruction to the jury not to discuss or consider the issue of punishment.[13] (See *In re Foster* (Kan.Ct.App. 2005) 107 P.3d 1249, 1253-1254.) The jury was further advised not to be "influenced by sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." We must presume the jury followed these instructions and did not consider defendant's recommitment or release in its deliberations. (*People v. Boyette* (2002) 29 Cal.4th 381, 453; *People v. Morales* (2001) 25 Cal.4th 34, 47.) We conclude that the court did not

[13] The prosecutor gave the same reminder to the jury during his closing argument.

violate the proscription against advising the jury of the consequences of the verdict.

Accordingly, the judgment is affirmed.

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Swager, J.

We concur:

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Marchiano, P. J.

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Margulies, J.